STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Frederick M. Toca, Jr., P 56608,

Respondent/Appellant,

Case Nos. 08-22-AI; 08-85-JC; 08-140-GA

Decided: July 29, 2010

Appearances:

Cynthia C. Bullington, for the Grievance Administrator, Petitioner/Appellee
Donald D. Campbell, for the Respondent/Appellant

BOARD OPINION

This proceeding was commenced by the filing of various judgments of conviction as well as a formal complaint. The hearing panel entered an order of revocation. Respondent has petitioned for review. We affirm.

On March 6, 2008, the Attorney Discipline Board issued a Notice of Automatic Interim Suspension based on respondent's felony conviction for forgery of license documents/plates on February 22, 2008. A Notice of Filing of Judgment of Conviction was filed with this Board on June 18, 2008, by the Grievance Administrator, and an Amended Notice of Filing of Judgments of Convictions was filed on September 30, 2008. The amended notice stated that respondent was convicted of driving while license suspended, and a forgery of license documents, misdemeanors, in violation of MCL 257.904(1)(C) and MCR 257.324 in the 47th District Court. The amended notice also stated that respondent was convicted, on May 6, 2008, for forgery of license documents, a felony, in violation of MCL 257.257, in the Oakland County Circuit Court. Finally, the amended notice stated that respondent was convicted on July 2, 2008, for no valid license in possession, a misdemeanor, in the 46th Judicial District Court.

The Grievance Administrator also filed Formal Complaint 08-140-GA alleging that respondent's conduct with respect to the execution, notarization, and filing of five affidavits in a Wayne Circuit case and a subsequent appeal violated MRPC 8.4(a)-(c) and MCR 9.104(A)(1)-(3). Two affidavits were purportedly signed by police officer Ata Dabish and notarized by Nicole Davis. The remaining three affidavits, from affiants Willie Parker, Gregory Thrift, and Michael Brown, were purportedly notarized by David Canine.

Formal Complaint 08-140-GA was consolidated for hearing with Case Nos. 08-22-AI and 08-85-JC, and the respondent's default for failure to file an answer to the formal complaint was filed with the Board on October 31, 2008. Respondent moved to set aside the default, which motion was denied by the hearing panel on February 24, 2009, for the reasons that respondent had shown neither good cause nor a meritorious defense to the charges. See MCR 2.603(D)(1). This Board denied respondent's petition for interlocutory review of the panel's decision because an abuse of the panel's discretion had not been shown. Respondent then filed an application for leave to appeal with the Michigan Supreme Court, which was denied by the Court on June 3, 2009, because "respondent has not been aggrieved 'by a final order of discipline or dismissal' entered by the Attorney Discipline Board. MCR 9.122(A)(1)." *Grievance Administrator v Frederick M. Toca, Jr.* , 765 NW2d 612 (Mich, 2009).[1]

Following the interlocutory appellate proceedings, a renewed motion to set aside the default was denied by the panel and the hearing on discipline was held. The panel allowed respondent's counsel to present evidence in mitigation, including the report of a handwriting analyst which opined that the notary's signature on the Parker and Thrift affidavits "were written by the same person," i.e., Mr. David Canine. As to the Brown affidavit, however, the original could not be examined and the analyst could only state that the notary's signature was "highly probably written" by Mr. Canine. Counsel for the Grievance Administrator voluntarily dismissed the allegations regarding those two affidavits, but the allegations regarding the Brown affidavit and the two Dabish affidavits remained.[2]

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[1] Supreme Court Docket No. 138947.

[2] Notwithstanding the fact that the default had not been set aside despite several attempts, the Administrator stipulated to the dismissal of paragraphs 9, and 15(c) and (d) of the formal complaint. See Stipulation, Respondent's Ex A (at 11/6/09 hearing on discipline). Paragraph 9 of the formal complaint alleges that "Attorney David Canine maintained offices across the hall from Respondent in a shared suite in April of 2006, but he did not notarize the aforementioned affidavits for Parker, Thrift, *and Brown*" (emphasis added). Although the stipulation does not encompass dismissal of the allegation in paragraph 15(e) of the formal complaint that the

After the hearing on discipline, the hearing panel issued its order revoking respondent's license to practice law, commencing January 27, 2010.

Respondent raises four issues in his petition for review and brief in support. First, respondent argues that the default was improper because it was not entered by a court clerk as required by MCR 2.603(A)(1). We find no error requiring reversal. Except as otherwise provided in subchapter 9.100 of the Michigan Court Rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. MCR 9.115(A). Subchapter 9.100 provides that: "A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint or asserting grounds for failing to do so." MCR 9.115(D)(2). We are not persuaded that the proceedings are invalid unless either a court clerk (or, analogizing, ADB personnel) actually perform an action denominated "entry of default." Nor are we convinced that respondent has been prejudiced by any action in these proceedings. Respondent's failure to answer or otherwise defend is not contested. Whether AGC counsel purports to enter the default by the filing of a document so captioned, or counsel submits a notice to the ADB and entry immediately follows receipt, is of no practical significance. In either case, a respondent would have no opportunity to act until the default is set aside. Even if there were error here, we would find no basis for reversal. MCR 9.102(A) (subchapter 9.100 is to be liberally construed for the protection of the public.); MCR 9.107(A) (a proceeding under subchapter 9.100 may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice).

Next, respondent argues that the hearing panel abused its discretion by not setting aside the default. We disagree.

Except when grounded on lack of jurisdiction, a motion to set aside a default shall be granted only if good cause is shown and an affidavit of facts is filed. MCR 2.603(D)(1). A hearing panel's decision to grant or deny a motion to set aside a default is committed to the panel's discretion, but there must be a sufficient showing as to both good cause and a meritorious defense. *Grievance Administrator v Clyde Ritchie*, ADB 52-87 (ADB 1988) (panel's decision to set aside default

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Brown affidavit "was never signed or notarized by Attorney Canine as the document purports," we will presume that the hearing panel did not include the allegations regarding the Brown affidavit among the misconduct for which discipline was imposed. In any event, we decide this matter as if these allegations were not established by default or otherwise and are not part of the misconduct for which discipline was imposed.

reversed where showing of good cause not shown). See also *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229 (1999) (disapproving of the Court of Appeals' "blurring" of the two requirements and reinstating trial court's denial of motion to set aside default). However, "if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Alken-Ziegler,* 461 Mich at 223-224.

A hearing panel's decision whether to set aside a default will not be disturbed absent an abuse of discretion. *Grievance Administrator v Simon, et. al.* , 02-83-GA (ADB 2003) (Citing *Alken-Ziegler, supra,* and emphasizing deference owed to panel's determination). As the Court stated, "Where there has been a valid exercise of discretion, appellate review is sharply limited." *Alken-Ziegler,* 461 Mich at 228.

Respondent's explanation for failing to answer the formal complaint is that he confused an answer to the formal complaint with a request for investigation. In other words, he thought his answer to the request for investigation during the pre-formal complaint investigation by the AGC relieved him of responsibility to answer the allegations in the formal complaint filed with the Board and served on him. The panel was certainly not required to credit this argument even if this had been respondent's first formal case. However, we also note that respondent has been a party to other disciplinary actions wherein he received requests for investigations and formal complaints and he is therefore familiar with the appearance of such documents, as well as his duties under MCR 9.115(D)(1). In fact, prior to the instant case, respondent had been served (and timely answered) two separate formal complaints within the last six years.

In addition to a showing of good cause, respondent was required to submit "an affidavit of facts showing a meritorious defense." MCR 2.603(D)(1). The hearing panel considered respondent's affidavit in support of his motion to set aside default stating that "all of the evidence in this matter proves that all affidavits submitted in this matter were properly executed and sworn to as indicated by those who submitted same." The panel also reviewed various documents attached to the motions. Most of respondent's arguments have focused on the affidavits of Parker, Thrift, and Brown. As we have noted above, we consider the formal complaint's allegations regarding the Dabish affidavits to be the only ones not disposed of at this stage. After a careful review of the record and respondent's arguments, we find no basis to conclude that the panel's decision not to set aside the default constitutes an abuse of discretion.

Additionally, at the hearing on discipline, the panel was very liberal in allowing respondent to present evidence in mitigation:

> Mr. Chairman: The panelists have taken a moment. The panel is well aware there's a default entered in the inquiry. Our ruling is that the Grievance Administrator is seeking revocation. And that the panel, if it's going to err, its' going to err perhaps on the liberal side in terms of allowing the respondent to provide mitigating information. So we're going to allow the examination to continue. [Tr 11/06/09, p 85.]

We note that evidence at the hearing on discipline, including respondent's testimony, certainly does not establish that allowing the default to stand as to the allegations regarding the Dabish affidavits amounts to a miscarriage of justice.

The third issued raised by respondent is that the level of discipline is excessive in light of the misconduct. Upon review of the nature of the charged misconduct, it appears fairly obvious that revocation was the appropriate level of discipline. Respondent testified that, while his license was suspended, he received in the mail the license tabs belonging to the previous owner of his home. He intentionally placed the license plate tabs on his motor vehicle, drove on a suspended license, and then misrepresented his identity to the traffic officer who pulled him over. Respondent candidly admitted that he gave the officer a false name in an effort to avoid detection. As the panel found:

> Here, respondent has violated duties owed to the public by committing criminal acts reflecting adversely on his honesty, trustworthiness or fitness as a lawyer, and for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by submitting false affidavits to the trial and appellate courts. See ABA Standard 5.1. Notably, with respect to respondent's criminal acts, there is no question and/or dispute that respondent acted intentionally and knowingly when he placed false license plate tabs on his motor vehicle and proceeded to drive on a suspended driver's license. Indeed, and most disconcerting, respondent admitted that he placed the false tabs on his motor vehicle "<u>because [he] didn't think [he] was going to get caught</u>." (Tr 11/6/09, p 51.) [HP Report, p 3; emphasis in original.]

In addition to the misconduct relating to the Dabish affidavits established by the default with respect to Formal Complaint 08-140-GA, this case also presents several convictions involving dishonest conduct. Respondent's previous misconduct includes holding himself out as an attorney before admission to the Michigan bar, entering into a fee agreement wherein he improperly acquired literary or media rights related to his client's criminal matter, misleading advertising, and commingling and conversion of client funds. Given the number and nature of these and other

aggravating factors identified by the panel, and the multiple instances of misconduct here, we find no reason to disagree with the panel's conclusion that revocation of respondent's license to practice law in Michigan is the appropriate sanction to be imposed in order to protect the public, the courts, and the profession.

Respondent's final claim of error is that the panel ordered that the commencement date of respondent's revocation to begin January 27, 2010, which is 21 days after the entry of the order of revocation, instead of making the commencement date retroactive to February 22, 2008, the date of respondent's conviction. MCR 9.115(J)(3) provides that a discipline order "shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date." Pursuant to MCR 9.120(B)(1), a lawyer convicted of a felony is automatically suspended by operation of law "until the effective date of an order filed by a hearing panel under MCR 9.115(J)," i.e., until a hearing is concluded and discipline is ordered.

Respondent was convicted of the felony charge of forgery/alteration regarding license plate tabs on February 22, 2008, and has been continuously suspended since that time. Respondent was then suspended for two years in case # 06-85-GA pursuant to an order effective April 11, 2008. Respondent argues that the panel ignored a practice of the Board and other panels to order that, in cases involving felony convictions, the effective date of an order of suspension be the date of an automatic interim suspension pursuant to MCR 9.120(B)(1). This is a reasonable and fair result when a lawyer is automatically removed from practice pending adjudication and is not subject to an overlapping suspension in an unrelated case. However, in this case respondent was suspended in another matter shortly after his automatic suspension resulting from the felony conviction. We cannot find that the hearing panel's adherence to MCR 9.115(J)(3)'s terms is erroneous or unfair under the circumstances of this case.

Board members Thomas G. Kienbaum, William L. Matthews, C.P.A., Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, James M. Cameron, Jr., and Sylvia P. Whitmer, Ph.D. concur in this decision.

Board member William J. Danhof was absent and did not participate.

Concurrence - Thomas G. Kienbaum, Vice-Chairperson:

I fully concur in all aspects of our decision. I write separately only to emphasize that while I believe the public and profession are best protected by having disciplinary matters ordinarily

adjudicated on the merits, on the facts of this case, the panel's decision not to set the default aside is properly affirmed.

While MCR 2.603(D)(1) does not distinguish between defaults in "major" and "minor" cases, it is inevitable that where, as here, the equivalent of "bet the company" is presented, the meritorious defense factor will be closely scrutinized, perhaps with a more lenient eye towards the "good cause" factor. Our principal opinion in this case, citing *Alken-Ziegler*, 461 Mich at 223-224, recognizes this.

At first glance the fact that a default was entered, and not set aside, may appear troubling. Respondent was defaulted some nine days after his answer to the formal complaint was due. Within five days of being defaulted, he contacted the Administrator and explained his mistaken belief that he had answered and re-sent his answer to the request for investigation. Thereafter, he appeared in order to vigorously defend. Ordinarily prosecutorial discretion would seem to warrant addressing the merits of a complaint seeking revocation of one's license where respondent answers a mere nine days late, and at least tries to articulate a reason for being late, even if this might not constitute sufficient "good cause."

As a consequence we scrutinized the record with particular care.

As an initial matter no defense, let alone a meritorious defense, was or could have been offered in rebuttal to the three criminal convictions – two misdemeanors and one felony.

With respect to the affidavits claimed to have been fraudulently verified, no meritorious defense was proffered as to two of the five. These instances of essentially uncontested misconduct formed the basis of the panel's order, and our affirmance. Given the misconduct, disbarment was within the applicable standards under which we must operate.

Additionally the panel, as we noted, gave respondent leeway in providing evidence that might more appropriately have pertained to the underlying merits, rather than mitigation. Finally, counsel for the Grievance Administrator did evaluate Respondent's proffered evidence after default, and agreed to dismiss allegations pertaining to some of the affidavits.

Respondent simply was not able to articulate a meritorious defense as to charges warranting disbarment, even if we had given him the benefit of the doubt on the "good cause" factor under the Rule. Accordingly, although I might be more receptive to the argument that a case involving presumptively disbarment-level misconduct should be resolved after a full hearing on the merits, respondent has had the opportunity to make a record as to his defenses and we find no abuse of discretion and certainly no miscarriage of justice in allowing the default to stand and affirming the panel's imposition of disbarment in this case.